appellants' defence and these circumstances may well have a bearing on the question of waiver.

For the reasons stated above we are of the view that the judgment of Harun J. must be reversed and that the appeal should be allowed with costs. Our order therefore is that the respondents' claim for the sum of $28,552 and interest thereon is dismissed and that the deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Azman, Davidson; Shook Lin & Bok.*

AHMAD HARIRI & ORS. v. LEMBAGA PELABUHAN KELANG

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) February 26 & March 12, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 191 of 1980]

Labour Law — Employment — Terms and Conditions of Service — Dark allowance — Housing or rental in lieu of housing allowance — Option date — Essential posts — Service Circular No. 1 of 1975.

The appellants in this case were employed by the respondents as security officers, assistant security officers, security assistants and junior security assistants. They worked in shifts, which included a night shift. They claimed that those whose shift duties, fell between 10 p.m. and 6 a.m. were entitled to receive the dark allowance with retrospective effect from 1st January 1970, under paragraph 84 of the Service Circular No. 1 of 1975. They also claimed housing or rental in lieu of housing allowance. Wan Hamzah J. in the High Court dismissed the claims and the appellants appealed.

Held: (1) the issue in this case is one of basic contractual obligation founded upon the terms and conditions of service agreed upon between the parties. What is significant to note is that one of the terms of the appellants' appointment was that they be eligible to such allowance as may be force from time to time in accordance with the circulars issued by the respondents;

(2) the appellants were entitled to the dark allowance provided under Circular 84 but the payment for such allowance should only be effective from the option date;

(3) the benefit of the dark allowance should accrue to those who were required and did work between the hours of 10 p.m. and 6 a.m. effective on and after the date of the option. The Senior Assistant Registrar will be directed to secure from the respondent the necessary evidence to determine the quantum due to each appellant and to determine accordingly;

(4) as the appellants were not in fact required to be present on call at all times in their place of work, they cannot be regarded as holding "essential posts" within the meaning of the service circular.

FEDERAL COURT.

G.T. Rajan for the appellants.

Zainuddin Ismail for the respondents.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): There are only two issues we have to determine in this appeal, whether the appellants Ahmad Hariri bin Abu Bakar and 298 others are entitled to (a) dark allowance and (b) housing or rental in lieu of housing allowance.

Wan Hamzah J. in the High Court at Kuala Lumpur dismissed the appellants' claim.

The facts, not in dispute, are that the appellants comprising of Security Officers, Assistant Security Officers, Security Assistants and Junior Security Assistants, are in the employment of the Lembaga Pelabuhan Kelang, the respondents. They worked in shifts, i.e. from 7.00 a.m. to 3.00 p.m., from 3.00 p.m. to 11.00 p.m. and from 11.00 p.m. to 3.00 a.m. They claim that those whose shift duties fell between 10.00 p.m. and 6.00 a.m. and who performed these duties during the period retrospective to January 1, 1970 were entitled to receive the dark allowance as provided under para. 84 of the Service Circular No. 1 of 1975 ("the Circular") issued by the respondents which reads —

"Dark Allowance

84. Employees who are required to work between 10.00 p.m. and 6.00 a.m. shall be eligible for Dark Allowance based on Government rates."

The learned judge concluded that it was never intended that those who worked in shifts like the appellants be paid dark allowance. He said that there was in force prior to January 1, 1970 Hours of Work and Overtime Rules, 1965 governing the payment of dark allowance but the appellants were not eligible for such allowance under the Rules. In arriving at that conclusion the learned judge took into consideration the recommendation of the Harun Commission concerning dark allowances and the relevant paragraph reads —

"Dark allowance is payable to officers who are required to work between 10.00 p.m. and 6.00 a.m. The rate is at 15 cts. per hour if on ordinary time and 1½ times of above rate if work is performed on overtime. We recommend that this allowance be retained at Government rates."

He then went on to say —

"It should be noted that the recommendation was merely that the dark allowance be retained as it had been applicable (though to be payable at Government rates), and there was no recommendation that dark allowance be expanded or extended to apply to those who had not been eligible for it. It seems that the reason why it was not recommended that employees of the plaintiffs' category be eligible for dark allowance was because the nature of their duties is such that they have to work on shifts and in fixing their salaries their inconvenience of having to work on night shifts was taken into account. This is indicated by a passage appearing in Harun Commission's report Vol. 1 at page 100, paragraph 5.7 which reads:—

'A number of I.M.G. Employees in the L.L.N. are on two different rates of pay though they are performing similar jobs. This is in respect of employees who are categorised as shift workers and day workers. The shift workers get higher wages than the day workers, in view of the extra hardship and inconvenience imposed upon them.'

Although in the above passage no reference is made to security officers, it does show that Harun Commission recognised the desirability of giving extra salary to employees working on shifts and that when fixing the salary for security officers Harun Commission took this factor into account."

The appellants contend that under the term of the employment they are eligible, in addition, for such allowance as may be in force from time to time in accordance with circulars issued by the respondents. Circular No. 1 of 1975 was such a circular.

On the other hand, it is the respondents' contention that the appellants were not entitled to receive dark allowance; only employees holding posts described in Schedule I of the Hours of Work and Over-

time Rules, 1965 were entitled to it and the appellants did not come under the Schedule. Two main reasons have been advanced by the respondents to support their contention —

(i) the *nature* of work of the appellants as security personnel in charge of security within the Port Area requires them to provide round-the-clock security in the Port Area which necessarily includes working during the dark hours i.e. between 10.00 p.m. and 6.00 a.m.

(ii) The *normal hours of work* of the appellants as security personnel are similar to those of other employees of the respondents, i.e. a period of 8 hours of work. By virtue of the nature of their work their normal hours of work comes within the period 10.00 p.m. and 6.00 a.m.

It is also the respondents' contention that the whole of the circumstances surrounding the payment of dark allowances and the reasons for the exclusion of the appellants must be taken into consideration.

In our view the eligibility of the appellants for dark allowance must neither be viewed in the light of the Harun Recommendations nor from circumstances surrounding the previous payment but must be considered solely under the provisions of the Circular with special reference to the terms and conditions of the service.

It is to be observed that para. 174 of the Circular provides that the Circular is deemed to have come into force on January 1, 1970. The appellants say that pursuant to the issue of the Circular they were asked to decide whether to opt to accept Harun's pay scheme and allowances and they did exercise the option and accepted the new scheme as in Service Circular No. 1 of 1975. The following provisions under the Circular are relevant for consideration.

"Rules and Regulations

177. The rules and regulations governing the terms and conditions of service obtaining in the Statutory Authority shall cease to be applicable to those employees who opt to accept the New Salaries and terms and conditions of service as set out in this Service Circular.

178. Steps are being taken to repeal, cancel or amend the relevant laws, circulars, orders and instructions as the case may be to bring them in conformity with the terms of this Service Circular."

The respondents have argued that these two provisions support their contention, in that the Hours of Work and Overtime Rules, 1965 are still in force until such time the respondents have completed the steps envisaged under para. 178 of the Circular. What the respondents are saying is that since these rules have not been repealed, cancelled or amended, they therefore are still effective and the appellants are accordingly disentitled to receive the dark allowance. With respect, we do not see merit in the respondents' contention.

Firstly, we would observe that the Harun Report contained recommendations which, if accepted by the relevant authorities, formed a basis for a revision of salaries and terms and conditions of service of employees in statutory bodies in Malaysia. The recommendations were open to either rejection or acceptance, as the case may be, and what this court should concern itself with is not the recommendations but the revised salary scheme and the terms and conditions of service that were offered to the appellants to determine whether or not the benefit of a particular revised term would be derived by that category of employees such as the appellants.

Secondly, we would also observe that the respondents have sought to rely upon the provisions of the Circular to be read in the light of the Harun Recommendations to determine whether the appellants were entitled to receive the dark allowance. In our view, there is no necessity for us to look at or invoke the aid of the Harun Recommendations, indeed they are irrelevant for the purpose of determining the effect of the Circular provisions.

We now turn to consider the effect of paras. 177 and 178 of the Circular. In this regard it is useful to direct our attention to the first para. of the Circular which provides that —

"The salary scales and terms and conditions of service of employees in Divisions I, II, III and IV and those of the Industrial and Manual Group (I.M.G.) or their equivalent in Statutory Authorities in Malaysia shall be revised as set out in this Service Circular. This Service Circular shall not apply to:

(a) Contract Officers*;
(b) Part-time Officers;
(c) Locally-Recruited Staff Employed Overseas;
(d) Employees on Shipping Articles;
(e) Employees currently paid on the Malaysian Agricultural Producers' Association (M.A.P.A.) rates;
(f) Federal Land Development Authority (F.E.L.D.A.) Shopping Assistants;
(g) Majlis Amanah Raayat (M.A.R.A.) Dockyard workers;
(h) Casual Workers except for those who have continuously been employed by the Statutory Authority concerned for not less than five years from the Effective Date; and
(i) Government employees on secondment terms,

who shall continue to be governed by their existing terms and conditions of service." (the italic is ours).

The appellants were not amongst those excluded by the Circular, indeed the Circular applied to them and for this reason it is also reasonable to construe in the light of the first paragraph of the Circular that the appellants were no longer governed by the existing terms and conditions of service.

Insofar as the appellants were concerned, the Circular has set out revised salary scheme and terms and conditions of service and if they should opt to accept such revised scales and terms and conditions of service, the benefits provided under the Circular, effective from the date of the option, should be enjoyed by them.

Para. 177 makes it absolutely clear that whatever rules and regulations that governed the terms and conditions of service of those given the option would cease to be applicable to them as from the date of the option (see para. 175). Insofar as the appellants were concerned, they should no longer be bound by the Hours of Work and Overtime Rules, 1965. The Rules that disentitled them to receive the allowance ceased to be operative when they opted to accept the new revised scheme. Therefore they were, as from the date of the option, entitled to receive the benefit provided by the Circular.

As for para. 178 it does not, in our view, prohibit or restrict the receipt of any such benefit but merely declares that steps should be taken to repeal, cancel or amend the relevant laws, circulars, orders, etc., as the case may be, to bring them in conformity with the terms of the Circular.

The Circular was made retrospective with effect from January 1, 1970 and it had accordingly the effect of altering the terms and conditions of service applicable to the appellants and superseding the provisions, be it rules or regulations, which disentitled the appellants from receiving the dark allowance. If therefore they were required to work during the relevant period between 10.00 p.m. to 6.00 a.m., they should be eligible for dark allowance based upon Government rates under para. 84 of the Circular.

Our attention has been drawn to sections 13, 15 of the Port Authorities Act 1963 and section 13A provides for the establishment of the Port Security Force and subsection (5) of section 13A provides that

"Any rules made under section 15 shall unless expressly excluded therein apply to members of the security force established in this section."

The question seems to arise whether the provisions contained in the Circular are rules. Strictly we do not think our answer to this question should affect the finding we have arrived at. Fundamentally the issue is one of basic contractual obligation founded upon the terms and conditions of service agreed upon between the parties. What in fact is significant to note is that one of the terms of the appellants' appointment was that they be eligible to such allowance as may be in force from time to time in accordance with circulars issued by the respondents.

In our judgment the appellants are entitled to the dark allowance provided under the Circular but the question is as from what date. Para. 174 of the Circular provides under sub-heading "Effective Dates" —

"174. This Service Circular shall be deemed to have come into force with effect from May 1, 1969 in respect of employees in Division IV and those in the Industrial and Manual Group or their equivalents and on January 1, 1970 in respect of employees in Divisions I, II and III or their equivalents."

It would seem at first sight that the provisions in this Circular would be deemed to have come into force in so far as the appellants were concerned as from January 1, 1970. Nevertheless para. 174 is immediately followed by para. 175 under the same sub-heading providing for the effective date of the payment of allowances provided under the Circular. Page 175 reads:—

"175. With the exception of the payment of Regional Allowance for employees in Sabah and Sarawak authorised under paragraph 107 of this Service Circular, *the payment of any allowance as provided in this Service Circular* and the cessation of payment of allowances which are abolished under this Service Circular *shall only be effective from the Option Date.*" (the italic is ours).

We would therefore hold that while the appellants are entitled to receive the dark allowance provided under this Circular, the payment for such allowance shall only be effective from the option date and they are therefore entitled to claim for any dark allowance due to any of them from such date and not from January 1, 1970.

Para. 174 the Circular was only deemed to have come into force as from January 1, 1970. This para. must be read subject to para. 175 in so far as the payment of any allowance was concerned. Therefore notwithstanding para. 174 the appellants cannot therefore claim to be entitled to receive the allowance as from January 1, 1970.

The words "notwithstanding para. 174" as used in para. 176 are not used in para. 175; nevertheless the operating words in that para. make it clear that the payment of any allowance other than the payment of Regional Allowance for employees in Sabah and Sarawak shall only come into force as from the date of option.

In our judgment the appeal must be resolved in favour of the appellants and the benefit of the dark allowance under the Circular should accrue to those who were required and did work between the hours of 10.00 p.m. and 6.00 a.m. effective on and after the date of the option.

The amount due to each appellant entitled to receive under the Circular shall have to be worked out and in this respect we consider it appropriate that the Senior Assistant Registrar be directed to secure from the respondents necessary evidence to determine the quantum accrued to each appellant and to determine accordingly.

Turning now to the claim for rent on quarters, the relevant para. in the Circular is para. 136, the relevant part of which reads —

"136. All employees, except those holding 'Essential Posts' and 'Scheduled Posts', who are occupying institutional quarters shall be required to pay rent as follows effective from the Option Date and as modified by Government from time to time:"

It means that those holding "Essential Posts" shall not be required to pay rent for any institutional quarters occupied by them — effective as from the Option Date. There is a further provision which we should also consider, namely, paragraph 134 which provides that —

"134. The Statutory Authority shall no longer be responsible for housing its employees except in the case of those who are holding 'Essential Posts' and 'Scheduled Posts'."

The meaning is clear: the respondents would not be responsible for housing unless the appellants were holding "Essential Posts" — defined as follows —

"'Essential Posts' shall mean those posts where employees are required to be present on call at all times at their places of work or at a determined place of work to ensure the proper performance of duties."

The appellants have argued that they were holding essential posts and reliance is placed on factors such as, the nature of the appellants' work suggesting that they were on call at all times if required to report for duty and disciplinary action for failure to respond to call.

The appellants are also contending that the question of declaring a post as "Essential Post" does not arise and in this regard it is submitted that as there is no such requirement in the Harun scheme and even if such a declaration was required the respondents should have made the necessary declaration to fulfil that contractual obligation.

We are with respect unable to agree with the appellants' contention. This contention of the appellants was canvassed and strenuously argued by them before the learned judge who, speaking of essential posts had this to say in his grounds of judgment —

"According to the definition, employees holding Essential Posts are those who are required to be present at all times at their place of work (or determined place of work) on call. As I understand the definition, they have to be present at their place of work at all times on call even though they may not be actually doing their work at the times. So firemen were required to be present at their place of work while on call although they are not actually performing their firefighting work but other firemen may be performing firefighting at the time. So also a lighthouse man is required to be present at the lighthouse all the time on call. In the evidence of these two plaintiffs there is nothing to show that they were required to be present at their place of work while on call. Although they were on call while they were not actually performing their functions, they were not required to be present at their place of work while on call.

When the plaintiffs were considered for appointment to their posts, they were given letters of offer in which certain conditions of appointment were stated, one of which was the following:—

'That you may be required to live in Port Authority quarters if these are allotted to you."

It is therefore clear that the defendants may provide the plaintiffs with quarters or may not do so under the contract of employment. The form of the letter of offer is contained in the Agreed Bundle of Documents at pages 1 and 2. It appears that some of the Security Officers were provided with quarters, but they should not treat this as their right, as it was merely a discretionary favour on the part of the defendants to provide them with quarters. Those who were provided with quarters were required to pay nominal rental. This is properly in accordance with the Service Circular."

We agree with the finding of the learned judge and we only have this to say; that having regard to the meaning given to the words "essential post", we do not think they could apply to the appellants — who were not in fact required to be present on call *at all times at their place of work* (emphasis is ours). They may be called upon to render duties but this does not necessarily mean that they were required to be present on call at all times at their place of work unlike those posts referred to and distinguished by the learned judge.

In our judgment the appellants were not as of right entitled under the Circular to this item of their claim and we accordingly dismiss it. We only allow the claim for dark allowance as from the date of option and costs.

Order accordingly.

Solicitors: *G.T. Rajan & Co.; Tunku Zuhri, Manan & Abdullah.*

S.E.A. HOUSING CORPORATION SDN. BHD. v. LEE POH CHOO

[F.C. (Suffian L.P., Syed Othman & Abdul Hamid F.JJ.) February 4 & March 19, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 67 of 1981]

Housing Developers — Breach of statutory rules — Effect of — Housing Developers (Control and Licensing) Rules, 1970, rr. 12 & 13 — Housing Developers (Control and Licensing) Act, 1966, s. 24.

Contract — Building Contract — Building not completed within eighteen months after date of contract — Exemption clause — Breach of statutory rules — Damages — Set-off — Housing Developers (Control and Licensing) Rules, 1970, rr. 12 & 13 — Housing Developers (Control and Licensing) Act, 1966, s. 24.

In this case the respondent had sued the appellants for damages for breach of contract and for delivery of documents of title relating to land and house in Petaling Jaya. The respondent had agreed to purchase the property from the appellants and it was a term of the agreement that the building on the said property should be completed within a period of eighteen months from the date of the agreement. The building was only completed some twenty three months after that date. The appellants claimed that they were protected by clause 32 in the agreement which exempted the appellant if the non-fulfilment of any terms and conditions of the agreement was caused by circumstances beyond their control. The issues in dispute between the parties at the trial were as follows:—

1. Do the Housing Developers (Control and Licensing) Act 1966 and 1970 Rules apply to this case. If they do, can the defendants contract out of the Act and the Rules?
2. What is the position of the defendants under the Common Law?
3. Can the plaintiff set off the last payment of the purchase price against liquidated damages?
4. Was the plaintiff in breach for non-payment of the last instalment of the purchase price?
5. Is the plaintiff entitled to special damages at $2,400 per month being rental?

The learned Judicial Commissioner ([1982] 1 M.L.J. 324) held (1) the Housing Developers (Control and Licensing) Rules, 1970, apply in this case and the defendant was in breach of the statutory provision of the rules; (2) the Housing Developers (Control and Licensing) Act, 1966 and the Rules were introduced for the public to regulate and control the business of housing developers and must be strictly followed; (3) the defendants could not contract out of the statutory provisions of the 1970 Rules; (4) the defendants have failed to prove that the delay in this case was due to circumstances beyond their control and therefore the plaintiff was entitled to damages as provided in the contract; (5) the plaintiff has a right to set-off the last payment of the purchase price against the liquidated damages; (6) the failure of the plaintiff to pay the balance of the purchase price did not amount to a repudiation of the contract; (7) the plaintiff had failed to prove her loss of use and occupation of the building by way of rental.

The appellant appealed and the three issues which arose in the appeal were —

1. Is clause 32 of the agreement valid?
2. If so, was the Judicial Commissioner right in holding that the acute shortage of cement etc. did not come within clause 32 such that the defendant is not liable for the delay? and
3. Did the respondent in withholding the payment of the last instalment due commit breach of the agreement?

The respondents cross-appealed against the dismissal of her claim for loss of rent.

Held: (1) it is clear that only terms and conditions designed to comply with the requirements of the Housing Developers (Control and Licensing) Rules, 1970, may be inserted in the contract of sale of land that is governed by the Housing Developers (Control and Licensing) Act, 1966 and the Rules, and that the contrary terms and conditions which purport to